87-273

No. 87 .....

Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ST. JOHN STEVEDORING CO., INC.
and
INSURANCE COMPANY OF NORTH AMERICA,
Petitioners,

v.

JOHNETTA WILFRED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Under the Longshore and Harbor Workers' Compensation Act:

I. After a longshore worker settles his third-party injury action without approval of the stevedore, are the worker's dependents entitled to compensation upon his death?

II. When evidence of an illegitimate child's paternity and dependency is in controversy:

A. May the Benefits Review Board simply substitute its opinion for that of the Administrative Law Judge, whose findings on paternity were supported by substantial evidence in the record considered as a whole?

B. May the Benefits Review Board deem the evidence of dependency conclusive as a matter of law even though the Administrative Law Judge never reached the issue of dependency?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

JOHNETTA WILFRED

ALENE C. JONES

ST. JOHN STEVEDORING CO., INC.

INSURANCE COMPANY OF NORTH AMERICA

SOLICITOR OF LABOR
UNITED STATES DEPARTMENT OF LABOR

DIRECTOR
OFFICE OF WORKERS' COMPENSATION
UNITED STATES DEPARTMENT OF LABOR

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on June 3, 1987, rehearing en banc denied on July 1, 1987, in a claim for death benefits under the Longshore and Harbor Workers' Compensation Act.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 818 F.2d 397 (5th Cir. 1987) (Appendix A). The opinion of the Benefits Review Board is reported at 18 B.R.B.S. 68 (1986) (Appendix B). The opinion of the Administrative Law Judge is reported at 17 B.R.B.S. 109 (ALJ) (1985) (Appendix C).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 3, 1987. A timely petition for rehearing en banc was denied on July 1, 1987. This petition for certiorari is filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 33 U.S.C. § 902(12):

> (12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

Title 33 U.S.C. § 909:

> If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit . . .

Title 33 U.S.C. § 909(f):

> All questions of dependency shall be determined as of the time of the injury.

Title 33 U.S.C. § 921(b)(3):

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party-in-interest from decisions with respect to claims of employees under this Chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole . . .

Title 33 U.S.C. § 933(a):

> (a) If on account of a disability or death for which compensation is payable under this chapter the person enti-

tled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Title 33 U.S.C. § 933(e)(1)(D):

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (i) The employer shall retain an amount equal to — (D) the present value of all amounts thereafter payable as compensation. . .

Title 33 U.S.C. § 933(g):

> (g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Following an injury of May 27, 1979, longshoreman John Henry Jones received benefits under the Longshore and Harbor Workers' Compensation Act (Act). Thereafter, he filed a third-party action for personal injury damages in Texas state court. This suit settled in December 1981 for a present cash value of more than $1 million. Employer, St. John Stevedoring Co., Inc.

(St. John) and carrier Insurance Company of North America (INA) received certain monies under this settlement, but never formally consented per Section 33 of the Act.

After John Henry Jones died June 8, 1982, Johnetta Wilfred claimed for death benefits as an illegitimate child. This claim was heard by Administrative Law Judge Walley in November 1983, who held that the child failed to prove paternity. He made no findings as to dependency.

The child appealed to the Benefits Review Board which held that the child should receive benefits despite the third-party settlement.

St. John and INA petitioned for review of the Board's Decision by the United States Court of Appeals for the Fifth Circuit, which affirmed.

B. Statement of the Facts

Longshoreman John Henry Jones was permanently and totally disabled as a result of an injury suffered in the Port of Galveston, Texas May 27, 1979 while working for St. John. He filed a personal injury lawsuit in Texas state court against various third-party defendants. This action settled in December 1981 for a present cash value of more than $1 million.

St. John and INA were reimbursed under the release agreement for benefits paid. They did not file a written approval of the third-party settlement on Form LS-33 in the office of the deputy commissioner within thirty days after the compromise was made.

During his third-party claim, John Henry Jones testified at deposition that he had an illegitimate daughter, Johnetta Wilfred. Although she was referenced in John Henry Jones' will, she did not receive a direct bequest. After his death, she claimed death benefits under the Act.

John Henry Jones made $200 a week as a longshoreman. From this amount, he supported himself in Galveston, the city where he was injured. He also supported his mother, Alene Jones, who lived in Brenham.

REASONS FOR GRANTING THE WRIT

I.

Third-Party Settlements Offset All Future Longshore Compensation, Even Death Benefits.

The Act entitles an employer to deduct from a third-party recovery "the present value of all amounts thereafter payable as compensation . . ." 33 U.S.C. § 933(e)(1)(D); see also *Bloomer* v. *Liberty Mutual Insurance Company*, 445 U.S. 74, 78-79 (1980).

"Compensation" includes the money allowance payable to an employee "or to his dependents" and includes "funeral benefits." 33 U.S.C. § 902(12).

It is therefore clear that Section 33 of the Act allows an employer to offset future death benefits against the proceeds of a decedent's third-party recovery.

II.

A Dependent Becomes "Entitled" To Benefits Under The Act, Even Though Compensation Is Not Yet Payable.

The opinions below hold that Section 33 offsets do not accrue until a dependent is actually receiving compensation *and* also settles with a third party. This reading of the Act is clearly mistaken.

"Entitlement" to compensation arises at the time of injury, which determines who is dependent upon the worker. Once a worker becomes totally disabled due to a compensable injury,

death benefits automatically accrue to his dependents. See 33 U.S.C. § 909 (preamble paragraph). The Act does not require that third-party actions be settled by persons actually *receiving* compensation before offset matures.

III.

Once A Third-Party Settlement Prejudices An Employer's Future Subrogation Rights, The Right Of Offset As To Payment Of Future Benefits Obtains.

John Henry Jones settled his third-party claim, not only for himself, but also for his "next of kin." The causes of action covered in the release included "loss of services," an item of damages peculiarly reserved to dependents under the general maritime law. *Sea-Land Services* v. *Gaudet*, 414 U.S. 573, 584-85 (1974). The third parties are now free to plead collateral estoppel as to those amounts paid and those items mentioned in the release. *Id.* at 592-95. Therefore, the child should have an equitable right to participation in the settlement.

Further, since the child's third-party claim has been prejudiced to the extent of collateral estoppel, the subrogation rights of the employer have also been prejudiced. Such prejudice either estops the death benefits claim of the child, or offsets the benefits payable. See *Chapman* v. *Hoage*, 296 U.S. 526, 532 (1936).

In any other construction, the compensation lien could never be ascertained in a judgment or settlement, since the potential recovery for death benefits would always loom. Therefore, no third-party case could ever be effectively settled as between the employer and the claimant, since the employer could never be assured that the third-party claim resolved all potential outcomes from the injury or death.

The following will obtain under the Fifth Circuit's decision:

> A father settles his claim for personal injury/wrongful death with third parties, recovering substantially. By will, he specifically devises those assets so as to deny his children. Despite the significant third-party recovery, the child resorts to longshore death benefits, available until the age of 25.

Such a result takes the Act beyond a *compensation scheme* and makes it a form of life insurance. This was neither the intent of the Act, nor has it been the judicial construction of the Act. *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, O.W.C.P.*, 455 U.S. 608, 615 n.10 (1982). *See also Standard Dredging Corporation* v. *Henderson*, 150 F.2d 78, 81 (5th Cir. 1945).

Dicta in *International Mercantile Marine Co.* v. *Lowe*, 93 F.2d 663 (2d Cir. 1938), cert. den., 304 U.S. 565 (1938), states that a new cause of action for death benefits arises upon death of the longshoreman. This case deals, however, not with a third-party settlement of a potential wrongful death claim, but with a widow's right to claim for benefits over and above pre-death weekly benefits paid the injured worker. *See also Hitt* v. *Cardillo*, 131 F.2d 233 (D.C. Cir. 1942), cert. den., 318 U.S. 770 (1943); *Hampton Roads Stevedoring Co.* v. *O'Hearne*, 184 F.2d 76 (4th Cir. 1950); *State Insurance Fund* v. *Pesce*, 548 F.2d 1112 (2d Cir. 1977); *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467 (1st Cir. 1979).

IV.

There Was Insufficient Factual Evidence Of The Illegitimate Child's Paternity, And Dependency At The Time Of The Longshoreman's Injury, To Support The Benefits Review Board's Award.

To recover benefits under the Act, an illegitimate child must prove paternity and dependency. Although the Act purports to require acknowledgement, the Supreme Court has held such a

requirement unconstitutional. *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972).

A. *The Administrative Law Judge properly questioned paternity of the child.* Judge Walley found insufficient evidence to prove paternity. He had heard evidence that the child's mother, Sheryl Wilfred, had sexual relations with John Henry Jones exclusively. He considered deposition testimony of John Henry Jones that Jones believed himself to be the father of a child.

He also considered the child's birth certificate, which indicated no father's name. He heard testimony from the mother and sister of John Henry Jones which questioned the paternity of the child.

The fact findings of the administrative law judge must stand, so long as they are supported by substantial evidence, are rational, and consistent with law. Judge Walley was free to consider the credibility of Sheryl Wilfred and possible bias or prejudice in her testimony. He simply did not believe her. *See*, 33 U.S.C. § 921(b)(3); *O'Keefe* v. *Smith, Hinchman & Gryllis Associates, Inc.*, 380 U.S. 359 (1965).

B. *There is controverted evidence as to dependency.* Judge Walley did not make any findings as to dependency, apparently because he did not reach the issue. Nevertheless, the Board ruled in favor of the child as a matter of law.

Dependency is a legitimate statutory prerequisite for Workers' Compensation benefits. *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. at 173-74. All questions of dependency under the Act must be based upon the time of *injury*. 33 U.S.C. § 909(f).

The child claimant, Johnetta Wilfred, was born post-injury. Nevertheless, she could recover upon a showing that, at the time of injury, her mother was dependent upon John Henry Jones. *Texas Employer's Insurance Association* v. *Shea*, 410 F.2d 56 (5th Cir. 1969). Yet there is *little* evidence of such dependency

at the time of injury: All evidence pertains to economic support *post-injury*. There is no evidence of financial support, continuous in nature, at the time of injury. *Texas Employer's Insurance Association* v. *Shea*, 410 F.2d at 62.

The evidence of the minor child's dependency is not "uncontroverted" as found by the Fifth Circuit.

The panel found that the minor child's mother was dependent at the time of injury. This was based upon testimony that the child's mother had been receiving payments in the form of money orders for $100 or so each.

The administrative law judge could easily discredit this testimony. His decision would have to be upheld so long as it were supported by substantial evidence, were rational, and consistent with law.

Yet, his finding could not only be supported by substantial evidence, it would also be quite rational, and would pend upon simple economic reality — disposable income. John Henry Jones averaged $200 a week for the year preceding his injury. From this, he would be expected to pay his income tax, longshore union dues, and his own support in the City of Galveston, where he lived. John Henry Jones also supported his mother in Brenham, paying her house note.

Frances Ray, sister to John Henry Jones, testified she knew nothing of any pre-injury support of Sheryl Wilfred, the child's mother.

The testimony of Florita Jacquet, maternal grandmother of the illegitimate child, testified that John Henry Jones sent money orders of $180 "every other week or every month" prior to his injury.

The administrative law judge could be totally justified in discounting this testimony of pre-injury support: John Henry Jones' average weekly wage just does not provide the arithmetic

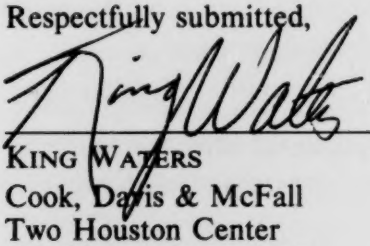
ability to provide for himself, his mother, and $180 monthly or bi-weekly to Ms. Wilfred.

The case should at least be remanded for further fact findings.

CONCLUSION

For these reasons, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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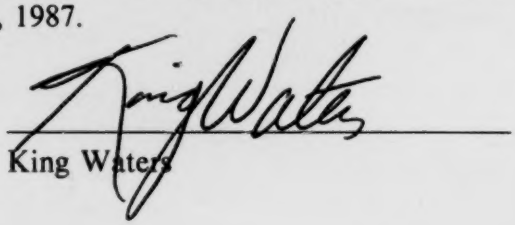
CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument have been served by certified mail, return receipt requested, upon each interested party, as appears below, on this 14th day of August, 1987.



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APPENDIX A

ST. JOHN STEVEDORING CO., INC.,
Employer, and Insurance Company of
North America, Carrier,

Petitioners,

v.

JOHNETTA WILFRED, ALENE C. JONES,
and Director, OWCP,

Respondents.

No. 86-4170.

United States Court of Appeals,

FIFTH CIRCUIT.

June 3, 1987.

POLITZ, Circuit Judge:

St. John Stevedoring Company, Inc. and Insurance Company of North America (INA) petition for review of a decision by the Benefits Review Board (BRB) awarding Longshore and Harbor Workers' Compensation Act (LHWCA, 33 U.S.C. §§ 901-950) death benefits to Alene C. Jones and Johnetta Rene Wilfred, mother and daughter, respectively, of John Henry Jones, the deceased worker. We deny review as relates to Johnetta Rene Wilfred but grant same as respects Alene C. Jones, finding that the benefits due her are subject to a credit, as discussed herein.

Background

On May 27, 1979, John Henry Jones sustained severe injuries during the course and scope of his employment by St. John Stevedoring. By December 23, 1981 he had received LHWCA compensation benefits from his employer totaling $291,839.71. On that date, he executed a compromise settlement agreement

with the parties against whom he had filed an *ex delicto* action. St. John Stevedoring and INA had intervened in Jones's tort suit, seeking recovery for compensation benefits.

The settlement agreement was executed by John Henry Jones, Alene C. Jones, the several tort defendants, St. John Stevedoring, and INA. The agreement provided for an immediate payment to John Henry Jones of $1,786,839.71, which included the sum due St. John Stevedoring and INA for past compensation benefits, plus $5,000 to Alene C. Jones, and, finally, $280,000 per year to John Henry Jones, for the balance of his life, providing that in the event he died before five annual payments were made, the remainder of those five payments would be made to Alene C. Jones, if she survived him, or to his estate, if she predeceased him. The agreement included a release of the tort-suit defendants and their insurers, a hold-harmless provision and, *inter alia,* the following:

> It is further understood and agreed that INA and St. John, in consideration for Said Sum and Future Payments, are to receive a credit therefor for accrual of all compensation benefits and medical expenses in the future.

The release recited that the sums paid and to be paid were received

> in full and complete satisfaction of any and all claims which [John Henry Jones & Alene C. Jones] have relating to said accident, injuries to and death of John Henry Jones, or damages claimed by said undersigned ... and that this release is intended to and does fully release all such claims.

A few months later, before the due date of the first annual payment, John Henry Jones died. Alene C. Jones and Sheryl Wilfred, on behalf of her minor daughter, Johnetta, initiated proceedings under 33 U.S.C. § 909, claiming LHWCA death benefits from St. John Stevedoring. In defense of the claims, St. John Stevedoring urged the settlement agreement and further contended that Johnetta was illegitimate and was not a child

within the meaning of the LHWCA. The matter was heard by an Administrative Law Judge who awarded benefits to Alene C. Jones but denied benefits to the child. On appeal, the BRB upheld the award to Alene C. Jones but reversed the ALJ and granted an award to the minor Johnetta. Both awards are now before us by virtue of the petition for review filed by St. John Stevedoring and INA.

ANALYSIS

Filiation and Dependency

A child entitled to LHWCA death benefits is defined to include an "acknowledged illegitimate child dependent upon the deceased," 33 U.S.C. § 902(14). St. John Stevedoring contends that resort must be had to the law of Louisiana, the state of Johnetta's domicile, to determine her filiation. The ALJ accepted their argument because as he noted, there is no body of federal family law.[1] The BRB disagreed with the ALJ's legal conclusion as to the applicable law. So do we.

---

[1] The ALJ relied on La.Civ.Code art. 209, which provides in pertinent part:

> B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgement under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.
>
> C. The proceeding required by this article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation, except for the sole purpose of establishing the right to recover damages under Article 2315. A proceeding for that purpose may be brought within one year of the death of the alleged parent and may be cumulated with the action to recover damages.

In *Texas Employers' Insurance Ass'n.* v. *Shea*, 410 F.2d 56 (5th Cir. 1969), we opined that "acknowledgment of paternity does not require a notary's seal or other ritualistic proclamation." *See also Weyerhaeuser Timber Co.* v. *Marshall*, 102 F.2d 78 (9th Cir. 1939). Application of rigorous state law schemes for proof of paternity, designed to serve various state interests such as the orderly devolution of property, especially immovable property, is inconsistent with the history and tradition of liberal administration of benefits under the LHWCA. *Voris* v. *Eikel*, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5 (1953). While state law may prove helpful in that a child under state law would likely be a child under the LHWCA, the converse would not necessarily follow. As *Shea* and other cases indicate, because state law precludes a designation of paternity will not bar LHWCA benefits if a paternal link is proven. As we observed nearly a half-century ago, "in constructing the act [LHWCA] we are not bound by technical definitions but must interpret it by giving to the words used their ordinary meaning." *Maryland Casualty Co.* v. *Lawson,* 101 F.2d 732 (5th Cir. 1939).

Applying this common approach to the definitional process, the BRB readily concluded that "the evidence overwhelmingly supports a finding of acknowledgment." The record contains a sworn deposition by John Henry Jones and the sworn testimony of Sheryl Wilfred that Johnetta is their child. Johnetta is identified as a child in John Henry Jones's will and was listed as his child in the obituary prepared by his family. The only contra evidence is that his name does not appear as father on Johnetta's birth certificate. In light of this evidence, and its conclusion that the ALJ had applied the wrong legal standard, the BRB reversed his finding on filiation. We affirm the BRB on this issue.

St. John Stevedoring next argues that Johnetta was not dependent on her father for financial support at "the time of the injury." 33 U.S.C. § 909(f). On May 22, 1979 Johnetta had been conceived. She was born the following October.

A child *en ventre sa mere* is dependent on a LHWCA-covered worker if, at the time of the accident, the child's mother was dependent on that worker. *Texas Employers' Insurance Ass'n* v. *Shea*. In determining the dependency of the mother and child, the LHWCA does not require that the mother be supported entirely by the covered worker; partial dependency is sufficient. *Texas Employers' Insurance Ass'n.* v. *Sheppeard*, 62 F.2d 122 (5th Cir. 1932). Dependency may result if the injured party was "maintaining or helping to maintain the dependent in his customary standard of living." *United States* v. *Fidelity & Guaranty Co.* v. *Britton*, 188 F.2d 674 (D.C. Cir. 1951).

During the time Sheryl Wilfred carried Johnetta to term, she received regular financial aid from John Henry Jones. The uncontroverted testimony reflects that from the time Johnetta was *in utero*, and continuing to the date of his death, John Henry Jones sent Ms. Wilfred hundreds of dollars for their support, notably in regular payments. In addition, he bought the child clothing and gifts. Applying the test articulated in *Sheppeard, Standard Dredging Corp.* v. *Henderson*, 150 F.2d 78 (5th Cir. 1945), and similar cases, to the pertinent facts herein, we fully agree with the BRB's finding of dependency. Johnetta Rene Wilfred is an eligible child, entitled to death benefits under the LHWCA.

The Settlement

Petitioners did not contest the eligibility of Alene C. Jones but vigorously argued that her claim, as well as that of Johnetta, was foreclosed by the settlement agreement. Alternatively, they claimed a credit for the amount received in settlement.

The BRB rejected petitioners' arguments and concluded that the mother's claim was not barred by 33 U.S.C. § 933(g), which provides that if a "person entitled to compensation" compromises a third-party claim for less than the total compensation payable,

he must first secure the employer's permission to settle. The BRB concluded that Alene C. Jones was not a "person entitled to compensation" when she signed the settlement agreement. As to the credit or off-set petitioners claimed under 33 U.S.C. § 933(f), the BRB used the same reasoning. Alene C. Jones was not a "person entitled to compensation" at the time of the settlement.

We do not disagree necessarily with the reasoning of the BRB on this statutory interpretation, but we perceive a contractual basis for requiring a credit. In the settlement agreement which Alene C. Jones voluntarily signed, although she was not a party to her son's tort action, she received $5,000 in cash and the contractual right to any of the annual $280,000 payments falling due after the death of John Henry Jones and before December 1986. In return for the cash payment and contingent right, she waived and released all rights, including any wrongful death claims, against the tortfeasors. In addition she agreed that St. John Stevedoring and INA would "receive a credit therefor for accrual of all compensation benefits . . . in the future." In doing so, Alene C. Jones obligated herself to give the employer and compensation carrier credit for all sums she received as a result of the tort settlement agreement. And as the BRB observed, her recovery of the $5,000 at signing and the $1,400,000 in annual payments far exceeds the death benefits she could have received under the LHWCA. St. John Stevedoring and INA are entitled to a credit for the full amount of compensation benefits owed to the decedent's mother. *See Peters* v. *No. River Ins. Co. of Morristown, N.J.*, 764 F.2d 306 (5th Cir. 1985); *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980).

That same reasoning does not apply to the minor child. Petitioners argue that because the decedent settled for his "heirs, executors, administrators, assigns, next of kin, or other legal representatives," the claim on behalf of the minor Johnetta is barred. The BRB did not so conclude, nor do we. John Henry

Jones did not have the power to settle or waive in advance any death benefits that might accrue to his minor daughter. The Act clearly contemplates that the rights of minors and those found mentally incompetent are to be protected. Section 911 envisions the appointment "by a court of competent jurisdiction" of a guardian for a minor, one who would then be empowered to act on behalf of the minor. Presumptively the law of Louisiana, Johnetta's domicile, would control. If not, the law of decedent's domicile, Texas, would. Under the laws of either state, court approval is required to compromise and settle a minor's claims. La. Code Civ. P. 4265; Rule 44, Tex. R. Civ. P. Nothing in this record reflects that such was done; indeed it is obvious that it was not done. The minor's rights, accordingly, are unaffected by the settlement agreement signed by her father.

Conclusion

We conclude that the BRB correctly found both Alene C. Jones and Johnetta Rene Wilfred eligible for LHWCA death benefits as a consequence of the death of John Henry Jones. In that regard, the petition for review is DENIED. However, we further conclude that St. John Stevedoring and INA are entitled to a credit against the compensation death benefits due Alene C. Jones for the sums she received by virtue of the settlement agreement she signed on December 23, 1981. That credit offsets in full her claim for benefits, and to that extent the petition for review is GRANTED.

Petition for review DENIED in part and GRANTED in part.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-4170

ST. JOHN STEVEDORING CO., INC.
AND INSURANCE COMPANY OF NORTH AMERICA,
Petitioners,

versus

JOHNETTA WILFRED, ALENE C. JONES
AND DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS,
Respondents.

Petitions for Review of an Order of the Benefits Review Board

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion June 3, 1987, 5 Cir., 198.., ... F.2d.....)
(July 1, 1987)

Before GEE, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the

Court and a majority of the Circuit Judges who are in regular active service not having in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX B

BRB Nos. 85-316
& 85-316A

ALENE C. JONES
(Mother of JOHN HENRY JONES, deceased)
Claimant-Cross-Respondent

and

JOHNETTA WILFRED, Minor
Claimant-Petitioner

v.

ST. JOHN STEVEDORING COMPANY, INCORPORATED

and

INSURANCE COMPANY OF NORTH AMERICA
Employer/Carrier-Respondents Cross-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-interest

DECISION AND ORDER

Appeal of the Decision and Order of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

J. Graham Hill and John Roberson (Hill, Parker, Franklin, Cardwell & Jones), Houston, Texas, for claimant Jones.

Theodore M. Haik, Jr., New Iberia, Louisiana, for claimant Wilfred.

King Waters (Vinson & Elkins), Houston, Texas, for employer/carrier.

Karen Kimball (Francis X. Lilly, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Counsel for Benefit Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, BROWN and McGranery, Administrative Appeals Judges.

PER CURIAM:

Sheryl Wilfred on behalf of her minor daughter Johnetta Wilfred appeals, and St. John Stevedoring Company (employer) cross-appeals, the Decision and Order (83-LHC-1698) of Administrative Law Judge Ben H. Walley awarding benefits to Alene C. Jones, mother of the deceased employee John Henry Jones and denying benefits to claimant Wilfred, on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et. seq.* (the Act).

The parties have stipulated that John Henry Jones sustained an injury on May 27, 1979, in the course and scope of his employment with St. John Stevedoring Company. Prior to his death in December 1981, decedent and his mother, Mrs. Alene Jones, jointly filed and settled a third-party action for the work related injuries. A final judgment was entered in that case for over $3.5 million in cash and annuities.[1] The decedent died on June 8, 1982, from a myocardial infarction.

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[1] The settlement provided for $1,786,839.71 in cash to the employee and $5,000 to Alene Jones, in addition to yearly payments of $280,000 to the employee commencing December 1982. In the event of the employee's death before December 1986, the annual payments were to continue through that date and be made to Alene Jones, if living, or to the estate of the employee in case of Alene Jones' death.

On behalf of her minor daughter, Sheryl Wilfred appeals a denial of death benefits, asserting her daughter's entitlement as the illegitimate daughter of deceased employee, John Henry Jones. Based on the provisions of the Louisiana Civil Code, the administrative law judge concluded that a preponderance of the evidence failed to establish the deceased employee's paternity and therefore awarded all death benefits to Mrs. Alene Jones, as mother and sole eligible dependent of the decedent. 33 U.S.C. § 902(15); 33 U.S.C. § 909. On appeal, the Director and claimant Wilfred contend that the administrative law judge erred in relying on Louisiana law and that Johnetta Wilfred is entitled to death benefits as the acknowledged and dependent illegitimate daughter of decedent under 33 U.S.C. § 902(14).

Employer cross-appeals alleging that Mrs. Jones' participation in the settlement of her injured son's third-party action prior to his death bars further compensation under 33 U.S.C. § 933(g). Alternatively, employer argues that it is entitled to an offset under 33 U.S.C. § 933(f) and therefore does not owe death benefits until the net proceeds of the settlement are exhausted.

Oral argument was heard on September 11, 1985, in Houston, Texas, at which time the Board denied claimant Wilfred's Motion to Strike and accepted employer's Response Brief.

The Board's scope of review is limited. If the findings of fact are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3); *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement under the Act, an illegitimate child must be both acknowledged and dependent upon the deceased. 33 U.S.C. § 902(14). Relying on *Ryan-Walsh Stevedoring Co., Inc.* v. *Trainer*, 601 F.2d 1305 (5th Cir. 1979), the administrative law judge determined that since the Act does not define the term "acknowledged illegitimate child," the state law

of Louisiana, the child's domicile, must apply the meaning of "acknowledged." Based on articles of the Louisiana Code which require either a formal declaration of paternity by the father or mother before two witnesses and a notary public, or a determination of filiation in a civil proceeding instituted by the child within certain time limits, the administrative law judge found that the record evidence failed to meet these requirements.

We agree with the Director and claimant that the administrative law judge erred in applying Louisiana law. As the Board recently held in *Bonds* v. *Smith & Kelly Co.*, ... BRBS ..... BRB No. 81-2519 (August 13, 1985), recourse to state law to define terms not defined in the Act is appropriate only when the term does not have a clear, common meaning and it cannot be easily defined. In *Bonds*, the Board held that the term "dependency" in Section 2(14) should be defined by reference to its common meaning rather than state law. The term "acknowledged," like "dependent," can be given a clear meaning and there is no reason to turn to restrictive state codes to define this term. A factual determination of whether an illegitimate child is "acknowledged" should be made based on its plain common meaning and relevant federal case law based on the record evidence. *See Texas Employer Insurance Association* v. *Shea*, 410 F.2d 56 (5th Cir. 1969) (Under Section 2(14) of the Act, " ... acknowledgment of paternity does not require a notary's seal or any other ritualistic proclamation ...").

In the instant case, the evidence overwhelmingly supports a finding of acknowledgement. The evidence regarding acknowledgement includes the sworn deposition of decedent dated June 30, 1981, wherein decedent publicly acknowledged the illegitimate child as his.[2] The record also contains decedent's Last Will

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[2] Employer contends that decedent's deposition in the third-party claim was inadmissable at the formal hearing under the Federal Rules of Evidence. Although employer attended the deposition, it contends it

and Testament in which he lists claimant Wilfred as a potential beneficiary along with decedent's brothers and sisters, and a memorial service sheet and obituary prepared by decedent's sister which refers to decedent's paternity. Additionally, the record includes the testimony of the mother, Sheryl Wilfred, at the formal hearing acknowledging the decedent as the father of her child, and testifying as to the time and place of conception. There is nothing in the record to suggest that claimant is not decedent's daughter. Since the evidence is clear, uncontradicted, and allows no other possible result, we find claimant Wilfred acknowledged under Section 2(14) as a matter of law.[3]

With regard to the question of dependency, Sheryl Wilfred testified that she depended on her mother and decedent for her support and that decedent would give money on a regular basis. Similar testimony was provided by decedent's sister, Frances Ray, and the witness Flo ita Jacquet. As claimant correctly argues,

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had no motive to develop testimony adverse to this claim at that time. We reject this contention since administrative law judges are not bound by the formal rules of evidence, 33 U.S.C. § 923(a), 20 C.F.R. § 702.339, *Darnell* v. *Bell Helicopter International Inc.*, 16 BRBS 98 (1984). Additionally, employer had ample opportunity to protect its interest by developing evidence in the proceedings below.

[3] We additionally note that our disposition of this case would appear to be the same even under an application of Louisiana law. Article 203 of the Louisiana Civil Code provides one method of establishing filiation of an illegitimate child:

> The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of the such child.

La. C.C. Art. 203. Decedent's deposition testimony was taken by a certified shorthand reporter and notary public before four witnesses. It would appear that his testimony suffices as a declaration publicly acknowledging the illegitimate child in the instant case for purposes of Article 203.

however, the administrative law judge failed to make a factual inquiry as to dependency because he found the acknowledgment issue dispositive. The uncontradicted testimony of all the witnesses nevertheless establishes that the child's mother relied on regular contributions of substantial sums of money from decedent. Accordingly, we reverse the adminstrative law judge's finding that claimant Wilfred is not decedent's "child" under Section 2(14) and hold that she has established acknowledgement and dependency as a matter of law. Claimant Wilfred is therefore entitled to benefits under the Act equal to 50 percent of decedent's average weekly wage plus adjustments pursuant to 33 U.S.C. § 910(f).

Regarding claimant Alene C. Jones, employer raises two issues in its cross-appeal. First, employer contends that Mrs. Jones' participation in the settlement of the third-party action bars death benefits under Section 33(g), 33 U.S.C.A. § 933(g) (West Supp. 1985), since no written approval was timely filed.[4] Second,

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[4] Section 33(g), as amended in 1984 provides:

> "(g)(1) if the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> "(2) if no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether

employer contends that it is entitled to offset under Section 33(f) and therefore does not owe death benefits to claimant until the net proceeds of the settlement are exhausted.

We hold that Section 33(g) is not applicable in the instant case. Due to the size of Mrs. Jones' portion of the settlement ($5,000 in cash and $280,000 per year annuity from December 1982, through December 1986), it would be impossible for the death benefits to *exceed* the settlement amount.[5]

Section 33(g) explicitly requires that the settlement be for an amount *less* than employer's liability for benefits. Since recovery beyond the settlement is impossible, Section 33(g) is not in controversy. Additionally, the written approval requirement of Section 33(g)(1) is inapplicable because the employee was not yet dead at time of the settlement and Mrs. Jones was thus not receiving death benefits from employer at the time of settlement. She was therefore not "entitled to compensation" within the meaning of Section 33(g)(1). *See generally Dorsey v. Cooper Stevedoring Co., Inc.*, ... BRBS ...., BRB No. 82-827 (Jan. 27, 1985). It would be absurd to require the mother to obtain Section 33(g)(1) approval so as to retain her right to death benefits where the employee is not dead.

Finally, regarding the offset issue, Section 33(f) provides that:

> If the person *entitled to compensation* institutes proceedings within the period prescribed in section 33(b), the employer

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the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

33 U.S.C.A. § 933(g)(West Supp. 1985).

[5] Section 9(d) provides for payment of 25 percent of the average weekly wage for a parent. Since we hold that the child also prevails, this would diminish to 126.6 percent of the average weekly wage. *See* 33 U.S.C. § 909(c), (d). The average weekly wage in this case is $200. This results in a compensation rate of no more than a few thousand dollars a year.

> shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C.A. § 933(f) (West Supp. 1985) (emphasis added). As the administrative law judge did not consider this issue, he did not provide for an offset.

In the instant case, the settlement was entered into prior to death and presumably compensated the employee and mother for loss due to the employee's disability, rather than loss due to his death. Thus, the lifetime settlement does not overlap with death benefits under Section 9. This factor is especially significant since, as discussed above, claimant was not a "person entitled to compensation" prior to decedent's death. We therefore hold that employer is not entitled to offset against the mother's third-party settlement under Section 33(f).

Accordingly, the administrative law judge's denial of benefits to claimant Wilfred is reversed. The award is modified to provide for recalculation of compensation benefits for claimants Jones and Wilfred under Section 9 consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

ROBERT L. RAMSEY
Chief Administrative
Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Dated this 31st day of January 1986.

APPENDIX C

In the matter of JOHN HENRY JONES (DECEASED) MRS. A. C. JONES (MOTHER), ET AL *Claimants* against ST. JOHN STEVEDORING CO., INC. *Employer* INSURANCE COMPANY OF NORTH AMERICA *Carrier*	Case No. 83-LHC-1698 OWCP No. 8-53831

J. Graham Hill, Esquire
For the Claimant, Mrs. A. C. Jones

Ted Haik, Jr., Esquire and Richard I. Haik, Esquire
For the Claimant, Johnetta Wilfred

King Waters, Esquire
for the Employer/Carrier

Before: BEN H. WALLEY
Administrative Law Judge

DECISION AND ORDER

This is a claim for death benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, *et. seq.* (hereinafter referred to as either LHWCA or the Act), which claim is based on the death of John H. Jones deceased (hereinafter referred to as the decedent), filed by his mother Mrs. Alene C. Jones; Sheryl Wilfred filed a separate claim on behalf of Johnetta Wilfred, decedent's alleged daughter. Prior to his death, the decedent filed a claim for compensation as a result of an injury which occurred on May 17, 1979, while in the course and scope of his employment with St. John Stevedoring

Co., Inc. (hereinafter referred to as the Employer), with a hearing held on December 15, 1982. The Employer is insured by Insurance Company of North America (hereinafter referred to as the Carrier).

An issue arose of the eligibility and dependency of the claiming mother and alleged minor daughter that could not be resolved administratively and the cause was referred to this office for a formal hearing. A hearing in this matter was held before an Administrative Law Judge on November 28, 1983, in Houston, Texas. The individual parties and their diverse interests are identified as follows:

1. Mrs. Alene C. Jones, Claimant, mother of the decedent, and her attorney;

2. Sheryl Wilfred, on behalf of her minor daughter, Johnetta Wilfred, claimant, and her attorneys;

3. St. John Stevedoring Co., Inc., and Insurance Company of North America, and their attorney, and a company representative of the insurance company.

Preliminary Matter

Counsel for Respondents has objected to the admissibility of certain evidentiary documents. At the formal hearing, counsel for Claimant Johnetta Wilfred offered into evidence a deposition taken of the decedent pertaining to a third party claim which he had filed. Both at formal hearing and subsequently in a brief submitted to this Court, counsel for Respondents objected to the introduction of any of decedent's deposition testimony rendered in connection with the third party claim. Under the provisions of 5 U.S.C. 554 and the regulations issued thereunder, I conclude that the deposition testimony of decedent, John H. Jones, is relevant and material to the matter at issue and is therefore received into evidence. 20 C.F.R. §702.338.

Findings of Fact and Conclusions of Law

At the outset of the hearing, inquiry was made of the parties and they responded by announcing agreement on certain material facts and dictated them into the record, which are as follows:

Stipulations

1. The named employee is John Henry Jones;

2. The date of injury was May 27, 1979;

3. The injury to decedent occurred in the course and scope of his employment with St. John Stevedoring Co., Inc.;

4. The decedent's employer was St. John Stevedoring Co., Inc.

5. The employer had statutory notice of the injury;

6. At the time of injury, John H. Jones' average weekly wage was $200.00;

7. The LHWCA applies to this proceeding;

8. The decedent died on June 8, 1982, and that on the date of his injury and on the date of his death, Mrs. A. C. Jones, decedent's mother, was economically dependent on him;

9. Mrs. A. C. Jones was the natural mother of John H. Jones;

10. Prior to the death of John H. Jones, a third party action was filed and settled. A release and settlement agreement was executed, and a final judgment was entered in that case;

11. A funeral bill in excess of $1,000 in reasonable and necessary funeral expenses was incurred, and the funeral expenses were paid out of the estate of the decedent;

12. All compensation benefits until the time of John H. Jones' death had been paid according to law. The employer was fully reimbursed as a result of the third party settlement.

The parties all agreed to the foregoing stipulations and I accept them as facts in this case. Since it has been stipulated that Mrs. A. C. Jones, Claimant, was economically dependent on the decedent, i.e. Claimant Mrs. Jones looked to and relied upon the contributions of the decedent/employee in whole or in part as a means of maintaining and supporting herself in accordance with the accustomed mode of life, I find Claimant, Mrs. Jones, entitled to an award of death benefits under the provisions of the Act. (33 U.S.C. § 902(15)).

Issue

Based on the foregoing facts of record, stipulations, and the evidence presented by the parties, both testimony and depositions of witnesses and their documentary evidence and exhibits, I find and conclude that the singular issue before me is whether Johnetta Wilfred, Claimant herein, was a legal dependent, and is therefore eligible for death benefits under Section 9 of the Act (33 U.S.C. § 909).

In order to establish entitlement to benefits, it is necessary to determine whether the Claimant Johnetta Wilfred qualifies as a "child" as defined by Section 902(14) of the LHWCA as follows:

> "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild,"

"brother," and "sister" include only persons who at the time of death of the deceased employee are under eighteen years of age. 33 U.S.C. § 902(14).

The definition of the term "child" includes an "acknowledge[d] illegitimate child dependent on the deceased. . . ." *Ingalls Shipbuilding Corporation v. Neuman,* 448 F.2d 773 (5th Cir. 1971), aff'g, 322 F. Supp. 1229 (S.D. Miss. 1970). Since the LHWCA does not define the term "acknowledged illegitimate child," the applicable state law of persons must supply its meaning. See *Ryan-Walsh Stevedoring Company, Inc. v. Trainer,* 601 F. 2d 1306, 10 BRBS 852 (5th Cir. 1979).

After determining which state law governs, it can then be decided whether Johnetta Wilfred is an "acknowledged illegitimate child" and thus falls within the purview of the Act's coverage.

The Proper Local Forum

To determine whether a Claimant is decedent's "child," state law is dispositive because the LHWCA does not define this operative term. *Ellis v. Henderson,* 204 F. 2d 173 (5th Cir.), cert. denied, 346 U.S. 873 (1953). The facts of record identifying events in two states, Texas and Louisiana, indicate that either may be the proper jurisdictional forum for resolving the issue in the instant case.

Because there is no federal law of persons, the law of Louisiana which is the state of the child's domicile, should be applied to determine the status of Johnetta Wilfred under the Act. *Texas Employers Insurance Association v. Shea,* 410 F.2d 56 (5th Cir. 1969); *Murphy v. Houma Well Service,* 409 F. 2d 804 (5th Cir. 1969).

Therefore, based on the foregoing, I find and conclude that the proper forum to determine the issue before me of the legal status

of Claimant Johnetta Wilfred is Louisiana. See La. C. Civ. P. Art 10 A(8); cf. *Daily v. Hough,* 368 So. 2d 1182 (La. App. Cir. 1979), writ denied, 369 So. 2d 1378.

Having concluded that the facts of this case must be measured according to the Louisiana Civil Code, what is the legal status of the Claimant, Johnetta Wilfred, in order to qualify for LHWCA death benefits?

Legal Status of Johnetta Wilfred

The evidence of record indicates that the decedent and Sheryl Wilfred, mother of Claimant Johnetta Wilfred, maintained a relationship from April 1978 until December 1978. Ms. Wilfred testified at the hearing that during that time she occasionally had sexual intercourse with decedent when they visited either in Texas or Louisiana. Ms. Wilfred further testified that the child, Johnetta Wilfred, was conceived in Louisiana in December 1978. Ms. Wilfred stated she continued to see John H. Jones until the date of his injury in Texas in May 1979. Johnetta Wilfred was born on October 4, 1979 in Louisiana.

Testimony rendered at the hearing by witnesses for both Claimants established that Ms. Wilfred received money orders from John H. Jones sent periodically from Texas to Louisiana both before and after Johnetta Wilfred was born. The amount of the money orders varies from $80.00 to $100.00, as did the times the money orders were sent, from two weeks to several months apart.

John H. Jones died in Texas in June 1982. His will was probated in Texas Civil Court.

Under the laws of Louisiana, authority for the acknowledged illegitimate child doctrine is derived from the Louisiana Civil Code. There exist two methods of establishing the paternity of an

illegitimate child. Article 203 of the Louisiana Civil Code provides:

> The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the present of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of such child.

Article 208 of the Code states the requirements for proving filiation (paternity) of an illegitimate child:

> A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.
>
> B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgement under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.
>
> C. The proceeding required by this Article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation.
>
> D. The right to bring this proceeding is heritable.

In *In re Martin,* 347 So. 2d 893 (La. App. 1st Cir. 1978), a Louisiana appellate court explained the burden of proof and sufficiency of the evidence required to constitute an acknowledgement under La. C.C. Art. 203.

According to the facts set forth in *Martin,* supra, the alleged father's name was listed on the birth certificate with no objection

on his part; the claimed natural parents were living together at the time of the illegitimate child's birth; and the alleged natural father admitted that the child was his. After the appellate court examined La. C.C. Art. 203 and the applicable caselaw, the court concluded that the facts presented were not sufficient to constitute an acknowledgement under La. C.C. Art. 203. The appellate court found that although the alleged natural father's name appeared on the birth certificate, it was established that someone other than the alleged father had placed the name in the birth records of the child. Furthermore, there is no contention that he signed it. The court also considered the admission and failure to protest by the alleged father. However, the court found these circumstances to be insufficient to meet the standard. The court reasoned: "[T] he code speaks in terms of acknowledgement being made in the 'registering of the birth.' * * * * See *Allen v. Anderson,* 55 So. 2d 596 (Orl. La. App. 1951)."

In a related case, *Boudreaux v. Matt,* 370 So. 2d 139 (La. App. 3rd Cir. 1979), that Louisiana appellate court discussed the legal consequences of evidence presented to establish acknowledgement. The court held that the plaintiff therein failed to establish that it was more probable than not that the alleged natural father was responsible for the child's conception, i.e. the burden of proof ordinarily required to establish an issue of fact. The court concluded that the evidence in that case failed to prove that the child was actually the illegitimate child of the alleged father or that plaintiff established paternity for the purposes of a claim for any of the rights given by law regarding parent and child.

This same Louisiana appellate court, the Third Circuit, considered the burden of proof required for a paternity action in *Fontenot v. Thierry*, 422 So. 2d 586 (La. App. 3rd Cir. 1982), writ denied, 427 So. 2d 868 (La. 1983). The court outlined the sufficient basis required to determine the paternity claim, i.e. by a preponderance of the evidence. Other appellate courts in Louisiana have interpreted this evidentiary standard strictly, placing it

as an ultimate issue of fact unless it is established with reasonable certainty that all other alternatives are impossible. *IMC Exploration Company and The Petroleum Corporation of America v. Foster Henderson*, 419 So. 2d 490 (La. App. 2d Cir. 1982), writ denied, 423 So. 2d 1149 (LA 1982), reconsideration denied, 427 So. 2d 866 (La. 1983).

The evidence presented by the parties at the hearing failed to establish by a preponderance of the evidence the paternity of Johnetta Wilfred. The deposition of decedent admitted into evidence contained information that he believed himself to be the natural father of Johnetta Wilfred. However, this does not qualify as a declaration of acknowledgment under the provisions of La. C.C. Art 203. Furthermore, the terms of decedent's will, also admitted into evidence, do not contain any provisions which would serve to recognize Johnetta Wilfred as his acknowledged illegitimate daughter. Finally, no records were introduced into evidence before this Court which demonstrated that a timely civil proceeding had ever been instituted which established the child's filiation according to the terms of La. C.C. Art. 208.

Based upon the standard set forth according to the provisions of the Louisiana Civil Code, it is my conclusion that there has been no substantial proof of paternity in the instant case; it has not been definitively established that the decedent was the natural father of Johnetta Wilfred.

Therefore, all death benefits should be paid to the eligible dependent Mrs. A. C. Jones, mother of the decedent, and said benefits should be paid to her in the amount and for the full time of her eligibility to receive said benefits according to the terms and provisions of the Act.

ORDER

IT IS THEREFORE ORDERED:

1. That the claim of Johnetta Wilfred, brought on her behalf by her natural mother, be and it is hereby DENIED; and

2. The Employer/Carrier shall pay unto Mrs. A. C. Jones, decedent's mother, the death benefits as provided by Section 9 of the Act, in the amount and for the time of her respective eligibility as provided by the Act (33 U.S.C. Section 901, et seq.); based on an average weekly wage of $200.00;

3. The Employer/Carrier shall pay to Claimant Mrs. A. C. Jones interest computed in accordance with 28 U.S.C. §1961 on each past due installment of death benefits until paid, to be computed by the Deputy Commissioner;

4. The Employer/Carrier shall pay the estate of John H. Jones $1,000.00 for reasonable funeral expenses pursuant to Section 9(2) of the Act; and

5. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

BEN H. WALLEY
Administrative Law Judge

Dated: December 18, 1984
New Orleans, Louisiana

(2)

Supreme Court, U.S.
FILED
SEP 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-273

In The

Supreme Court of the United States

October Term, 1987

—o—

ST. JOHN STEVEDORING CO., INC.

and

INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

v.

JOHNETTA WILFRED,

Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals erred in affirming the Benefits Review Board's finding that:

A. There was "uncontradicted testimony" of acknowledgment of the minor illegitimate child, Johnetta Rene Wilfred, by John Henry Jones.

B. The "uncontradicted testimony" of all witnesses establishes the child's mother relied on regular contributions of substantial funds of money, even though the Administrative Law Judge failed to make such a factual inquiry.

C. A fact or determination of whether an illegitimate child is "acknowledged" should be made based on its plain common meaning and relevant federal case law.

D. The child's cause of action should not be offset or prejudiced because of a settlement between other parties. Johnetta Rene Wilfred has not received death benefits under the LHWCA.

E. The child's cause of action has not summarily been prejudiced due to the scope of a settlement which the child was not a party.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

1. JOHNETTA RENE WILFRED
2. ALENE C. JONES
3. ST. JOHN STEVEDORING CO., INC.
4. INSURANCE COMPANY OF NORTH AMERICA
5. SOLICITOR OF LABOR
   UNITED STATES DEPARTMENT OF LABOR
6. DIRECTOR
   OFFICE OF WORKER'S COMPENSATION
   UNITED STATES DEPARTMENT OF LABOR

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C. The Fifth Circuit Court of Appeals was correct in that a fact or determination of whether an illegitimate child is "acknowledged" should be based on its plain common meaning and relevant federal case law 15

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No. 87-273

In The
Supreme Court of the United States
October Term, 1987

ST. JOHN STEVEDORING CO., INC.
and
INSURANCE COMPANY OF NORTH AMERICA,
Petitioners,
v.
JOHNETTA WILFRED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent prays that the writ of certiorari be denied and that the Judgment of the United States Court of Ap-

peals for the Fifth Circuit, entered in this case on June 3, 1987, rehearing en banc denied on July 1, 1987, in a claim for death benefits under the Longshore and Harbor Worker's Compensation Act be affirmed.

———o———

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 818 F.2d 397 (5th Cir. 1987). The opinion of the Benefits Review Board is reported at 18 B.R.B.S. 68 (1986). The opinion of the Administrative Law Judge is reported at 17 B.R.B.S. 109 (ALJ) (1985).

———o———

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 3, 1987. A timely petition for rehearing en banc was denied on July 1, 1987. This petition for certiorari is filed timely and the respondent's brief in opposition is filed timely. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

———o———

STATEMENT OF THE CASE

A. Statement of Prior Proceedings

On or about May 27, 1979, longshoreman John Henry Jones was working for St. John Stevedoring Co., Inc.,

when he sustained severe physical injury resulting in him being a quadriplegic. He began receiving benefits under the Longshore and Harbor Worker's Act. Thereafter, he filed a third-party action for personal injury in Texas State Court. This suit was settled and judgment entered for over one million dollars. This suit was settled and a third-party settlement was executed on December 21, 1981 by John Henry Jones, his mother, Alene Jones, and representatives of St. John Stevedoring Co., Inc. and the Insurance Company of North America.

John Henry Jones executed his "Last Will and Testament" dated March 17, 1982. In his Will he referred to respondent herein as "Johnetta Rene Jones". John Henry Jones died on June 8, 1982. There is ample evidence in the record to establish that John Henry Jones had a long term, intimate relationship beginning in 1978 with Sheryl Ann Wilfred. A child was born to Sheryl Ann Wilfred on October 4, 1979, and was named Johnetta Rene Wilfred. This child is the illegitimate daughter of John Henry Jones. She filed for death benefits under the Act and an informal hearing was held in Galveston, Texas on December 14, 1982. A formal hearing was held in Houston, Texas in November, 1983 before Administrative Law Judge Ben Wally. He rendered an erroneous Decision and Order in December, 1984 holding that based on the provisions of the Louisiana Civil Code, a preponderance of the evidence failed to establish the child's paternity and therefore awarded all benefits to the deceased's mother. The Administrative Law Judge remained silent on the issue of "dependency".

The child appealed to the Benefits Review Board which convened in Houston, Texas for an oral argument in

September 1985. The Board issued its Decision and Order in January 1986 reversing the Administrative Law Judge and holding that the child was "acknowledged" and "dependent" under the Act, that federal case law should apply, not Louisiana law, and she should receive benefits. The Employer/Carrier petitioned for review of the Board's Decision on March 10, 1986. The Fifth Circuit Court of Appeals affirmed the Decision of the Benefits Review Board and awarded death benefits to the minor child.

B. Statement of the Facts

I. In order to establish entitlement under the Act, an illegitimate child must be both "acknowledged" and "dependent" upon the deceased. 33 U.S.C. Section 902(14).

II. The Child "Acknowledged"

The child is acknowledged by John Henry Jones in many ways. The Will of John Henry Jones makes specific reference to "Johnetta Jones". This is a sworn document, properly executed, witnessed, with notary and formally declared. The obituary notice or funeral service sheet entitled "In Loving Memory of John Henry Jones" dated June 12, 1982, Mount Rose Missionary Baptist Church, Brenham, Texas mentioned that he is survived by "one daughter, Johnetta". The *Galveston Daily News,* dated June 10, 1982 "Obituary Notice" stated, "He is survived by a daughter, Johnetta Rhenae Wilfred of New Iberia, Louisiana".

The sister of John Henry Jones testified at the hearing before the Administrative Law Judge that she, Frances Ray, supplied the information for the "obituary notice" in the newspaper and the "service sheet" used at the

funeral, referring to the minor child, Johnetta. She stated in her deposition of January 20, 1983, that she "handled affairs after his injury and after his death."

A video deposition, sworn before a certified court reporter and notary public dated June 30, 1981, was given by John Henry Jones in his lawsuit hereinabove mentioned. John Henry Jones publicly acknowledged the illegitimate child, Johnetta Rene, as his child.

Letters and postcards sbumitted at the informal hearing and made part of the record herein prove a long term, intimate relationship before John Henry Jones' injury, after his injury and before his death. In fact, the letter dated March 2, 1979 refers to money being sent to Sheryl Ann Wilfred and John Henry Jones closes the letter with the following:

> "Signed you love,
> John H. Jones
> To Miss Sheryl Ann Wilfred
> (Jones to be)"

The record before the Administrative Law Judge concludes that the child is acknowledged. Testimony from the mother, Sheryl Ann Wilfred, the grandmother, and Florita Jacquet testified that the child was recognized in the community as the child of John Henry Jones and that John Henry Jones knew that this was his child. Alene Jones, mother of the deceased, said in her deposition that "he treated the child as his".

Affidavits of Patricia Dugas, Elsie Murray, and Florita Jacquet filed of record at the informal hearing in Galveston, Texas, all state that they had personal knowl-

edge of the relationship between Sheryl Ann Wilfred and John Henry Jones.

The Board of Review concluded and the Fifth Circuit Court of Appeals agreed and we submit same, that there is nothing in the record to suggest that claimant is not John Henry Jones' daughter. Since the evidence is clear, uncontradicted, and allows no other possible result, the child should be declared acknowledged by this Court.

III. The Child "Dependent"

With regard to the question of dependency, Sheryl Ann Wilfred testified that she depended on her mother for support and that decedent would give money on a regular basis. Similar testimony was given by decedent's sister, Frances Ray, and the witness, Florita Jacquet.

In the video deposition of John Henry Jones, he said:

> "She don't call herself Jones because—I may have some papers fixed up for her to be my daughter that says she's my daughter. I'm going to let her wear my name and get everything fixed up for her so she can be a Jones so I can take care of her properly."

He himself admits acknowledgment and his intention to support.

The affidavits submitted at the informal hearing of Sheryl Ann Wilfred, Elsie Murray, Patricia Dugas, Flority Jacquet and Terry Menard, further substantiate that Sheryl Ann Wilfred, mother of Johnetta, relied on regular contributions of substantial sums of money. In fact, the grocery store owner, Terry Menard, states Florita Jacquet, mother of Sheryl Ann Wilfred, and grandmother of Johnetta, cashed the money orders at his store. The Admin-

istrative Law Judge reached that conclusion, even though he did not decide the issue of dependency.

Petitioner erroneously argues that the issue of dependency is to be considered dependency of mother at the time of injury. In fact, the issue is dependency of the child. The evidence is uncontradicted that there was economic support of the mother by John Henry Jones before the child was born, but more importantly, substantial support after the child was conceived and born. Petitioner admits in his brief that "various witnesses testified as to post-injury financial contributions made by John Henry Jones and the child".

The deposition of the sister of John Henry Jones, Frances Ray, clearly proves the long-standing relationship and dependency. She testified she brought Sheryl Ann Wilfred to Galveston to visit John Henry Jones in December, 1978. That Sheryl went to the hospital to see John Henry Jones after the injury. Ms. Ray states "she assumed John to be the father of the child". She states she would send money every two weeks and would send it by money order and this went on for "2½ years". She sent gifts at Christmas.

The deposition of the mother of John Henry Jones, Alene Jones, further confirms "acknowledgment" and "dependency". She states that her son went to Louisiana and met Sheryl Ann Wilfred. He brought her up for Christmas one year. She first learned of Sheryl's pregnancy when Sheryl came to see John in the hospital after the accident. Sheryl told Ms. Jones, after the hospital visit, at the apartment. They bought things for the baby. They started sending money and gifts on a regular basis when

his compensation started and this was "about $45 every 2 weeks, sometimes as high as $80". This went on until John Henry Jones' lawsuit was settled and this money was sent by money order. The mother clearly states that Sheryl Ann Wilfred "brought the child to see him and he treated it as his".

———o———

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I.

SUMMARY OF THE ARGUMENT

A. The Fifth Circuit was correct in concluding that there was "uncontradicted evidence" of acknowledgment of the minor illegitimate child, Johnetta Rene, by John Henry Jones.

In order to establish entitlement under the Act, an illegitimate child must be both acknowledged and dependent upon the deceased. See 902(14) of the Longshore and Harbor Worker's Act states:

> "Child shall include a posthumous child, a child legally adopted proof to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one (1) year prior to the time of the injury, and a stepchild or *acknowledged illegitimate child dependent upon the deceased . . .*" 33 U.S.C. 902(14).

In *Weyerhauser Timber Co. v. Marshall*, 102 F.2d 78 (9th Cir., 1939), the Court expressly rejected the use of state law in the determination of who is an "acknowledged illegitimate child dependent". The Court stated:

> "Congress having provided all definitions necessary to the determination of whether claimant is a 'child' and its authority being paramount and exclusive as to the subjects on which it has legislated, it is not allowable to go beyond the Act provisions." 102 F.2d at 81.

This case stands for the principle that an orally acknowledged illegitimate is a "child" within the meaning of the Act and is entitled to benefits. There was an oral acknowledgment of the child by John Henry Jones in his video deposition. The fact that the decedent's sister, Frances Ray, recognized that there was a relationship between the mother, Sheryl, and John Henry Jones, and a relationship between John Henry Jones and the child. The affidavits of Florita Jacquet, Elsie Murray and Patricia Dugas recognizes acknowledgment of Sheryl Ann Wilfred.

The cases of *Ryan-Walsh Stevedoring Co., Inc. v. Trainer,* 601 F.2d 1306, 10 B.R.B.S. 852 (5th Cir., 1979), and *Ellis v. Henderson,* 204 F.2d 173 (5th Cir.), cert. denied, 346 U.S. 873 (1953), cited by the Administrative Law Judge in support of the use of state law are readily distinguished from the present case. In *Ryan-Walsh Stevedoring Co., Inc.,* supra, state law was properly used to define the term "widow" as including only the "decedent's wife", an operative status undefined by the Act; hence, to be solved by the application of state law. See *Weyerhauser,* 102 F.2d at 81. Likewise, *Ellis,* supra, is also distinguishable in that it is concerned with the definition of "child" in 902(14) insofar as a legal presumption created that status due to the deceased employee's failure to bring an action to disavow paternity. In fact, the Fifth Circuit in *Ellis,* distinguished and cited with apparent approval *Weyerhauser Timber Co.*

The controlling case stated to acknowledge is "to own or admit as implying or incurring responsibility", citing Funk & Wagnall's New Standard Dictionary (1937 Ed.). Therefore, to acknowledge under the provisions of the LHWCA does not require a written act of acknowledgment. A longshoreman's orally acknowledged illegitimate is a "child" within the LHWCA and entitled to compensation. *Weyerhauser Timber Co.* A fortiori, an oral acknowledgment of an illegitimate child in a video deposition by an individual, duly sworn in the presence of a Notary Public and witnesses, certainly complies with the provisions of the LHWCA. See Video deposition of John Henry Jones, pages 21-24, in evidence.

Another Fifth Circuit case, *Texas Employer's Insurance Association v. Shea,* 410 F.2d 56 (5th Cir. 1969), lends further support for two (2) statements of law extracted from the cases above. First, the Court held that a posthumous illegitimate child falls within the statutory definition of a "child" in 902(14) without referring to state law, but rather relied on congressional intent. In reference to the definition of "child" in the LHWCA, the Court stated:

> "Moreover, this definition, in accord with the policy of the Act as a whole, must be liberally construed in favor of coverage and in a way which avoids harsh and incongruous results . . . dependence, not the legality of the father's nuptials, is the keynote of coverage . . ." 410 F.2d at 59.

Secondly, the Court not only negated the need for written or "another other ritualistic proclamation" of acknowledgment in that the child was en ventre sa mere. There mere cohabitation by deceased with the mother of the un-

born child, with knowledge of her pregnancy was a sufficient inference of acknowledgment, *Texas Employer's Insurance Association,* supra.

The petitioner continues to make erroneous reference to "paternity" and not "acknowledgment". In order to attempt to arrive at a conclusion that there is insufficient evidence to prove paternity he tries to rely on Louisiana state law. The Administrative Law Judge was looking for the wrong test when he was seeking proof of paternity. The case of most recent date on this issue is *Lashawn Bonds (Daughter of deceased, Johnny James Bonds) vs. Smith and Kelly Company and American Mutual Liability Insurance Company,* BRB 81-2519, August 13, 1985. The primary issue on appeal to the Benefits Review Board was whether Stephanie and Yvonne Anderson, the acknowledged illegitimate children of the deceased employee, Johnny James Bonds, were dependent upon the deceased pursuant to Section 2(14) of the Act 33 U.S.C., Section 902(14). The deceased employee's legitimate child contends that the Administrative Law Judge erred in applying Georgia law rather than Federal law and that Stephanie and Yvonne were dependent upon the decedent. The Administrative Law Judge found that both Stephanie and Yvonne were acknowledged illegitimate children. The Benefits Review Board affirmed this finding and the only issue remaining was whether or not they met the dependency requirements. The Administrative Law Judge relied on the definition of dependency used in Georgia's Domestic Relations Law because the term "dependent" is not defined in the Act. Petitioners contended that the dependency under the Act should be evaluated according to Federal Law which required a factual analysis of financial support and other

relevant factors. The Benefits Review Board in this case agreed. It stated:

> "Although it is sometimes appropriate to resort to local law for the definition of terms not defined in the Act, this approach is appropriate only when the term does not have a clear, common meaning and reasonable doubt exists as to the proper meaning of the term." *Marcus v. Director,* O.W.C. 548 Fed.2d 1044, 1047 N.4 (D.C. Cir., 1976); *Ryan Walsh Stevedoring v. Trainer,* 601 Fed.2d 1306 (5th Cir., 1979).

This decision certainly is "on all fours" with our argument before this Court.

In the alternative, and in event that this Honorable Court feels compelled to apply state law, the proper local forum is not that of Louisiana, but rather Texas. Realistically, there exists no conflicts of law between Louisiana and Texas as to this issue. It is obvious that each state has an interest in the acknowledgment of its illegitimate children and an equally important, but potentially conflicting interest in protecting the alleged father and his collateral relations. It is the latter of these concerns which mandates more conditions and formalities be observed before the state will pronounce that a child has been legitimated. If the state which is charged with the protection of the family, Texas in this case, is willing to hold the child legitimated, there exists no conflict between the two states. *Blythe v. Ayres,* 96 Cal. 532, 31 Pac. 915 (1982), referred to as perhaps the most important single case dealing with conflict of laws and illegitimate children, "promulgated the now black-letter rule that the legitimation depends upon the law of the father's domicile at the time of the alleged acts of legiti-

mation." *Ester, Illegitimate Children,* 36 Ind. L.J., 163, 180 (1961).

Under Texas law, legitimization proceedings can be either voluntary or involuntary, Tex. Fam. Code Ann. 13.01 et seq. (1980); both of which require formalities which are not present in the case at hand. However, this lack of formalities should not be dispositive as to the issue of acknowledgment. The Probate Code in 3(b) provides another means for an illegitimate child to inherit from the statutory legitimization proceedings, states as follows:

> "Child includes an adopted child, whether adopted by an existing or former statutory procedure or by acts of estoppel, but unless expressly so stated herein, does not include an *unrecognized, illegitimate child of the father".* (Italics added) Texas Prob. Code Ann. 3(b) (1980).

The interpretation of the above Italics language was at issue in *Johnson v. Mariscal,* 620 S.W. 2d 737, Cert. denied 102 S.Ct. 3496. The Texas Court in interpreting its own code stated:

> "By expressly excluding an unrecognized illegitimate child of the father, the statute impliedly provides that a *'recognized illegitimate child of the father is included in the definition of a child.'* Therefore, if a father does in fact 'recognize' his illegitimate child, then the child is entitled to inherit. By virtue of this statute, the recognized illegitimate child of the father may inherit from that father without other statutory legitimization". 620 S.W. 2d at 908

3(b) of the Probate Code should be considered in determining whether an illegitimate child has been acknowledged for purposes of 902(14) of the LHWCA. The averment is

not without support. First, Congress is enacting 42 U.S.C.A. 416(2)(A), relating to Social Security Benefits, has recognized the importance of Probate Law as it concerns the status of family relationships; to wit, in determining whether an applicant is the child or the parent of the insured, the Secretary shall apply such appropriate state law as would be applied in determining the devolution of interstate personal property. Secondly, the word "recognized", as used in *Johnson*, supra, is more analogous to 902 (14) use of "acknowledged" than is "legitimization proceedings" in the Texas Family Code. Lastly, in its own right as further support of the above, the definitions of "child" in 902 (14) has been referred to as very broad and should be liberally constructed in favor of coverage in accord with the policy of the LHWCA, *Texas Employers Insurance Association*, supra.

B. The Fifth Circuit Court of Appeal was correct in concluding that the child's mother relied on "regular contributions of substantial money" from John Henry Jones to the mother, Sheryl Ann Wilfred and the child, Johnetta Rene Wilfred.

The Administrative Law Judge did not make any findings as to dependency. He was silent but the Board of Review did and they found there was dependency. Pregnancy, by its nature, is a state wherein the unborn child is a "dependent" upon its mother. The child is incapable of independent dependency. The petitioner equates "dependency" with economic support". This would preclude an unborn child from ever receiving benefits. See *Sheppeard Standard Dredging Corporation v. Henderson*, 150 F.2d 78 (5th Cir., 1945).

A child en ventre sa mere is dependent on a LHWCA-Covered Worker, if at the time of the accident, the child's mother was dependent on that worker. *Texas Employer's Insurance Association v. Shea.* In determining the dependency of a mother and child, the LHWCA does not require that the mother be supported entirely by the covered worker, partial dependency is sufficient. *Texas Employer's Insurance Association v. Sheppeard,* 62 F.2d 122 (5th Cir., 1932). Dependency may result if the injured party was "maintaining or helping to maintain the dependent is his customary standard of living." *United States Fidelity and Guaranty Company v. Britton,* 188 F.2d 674 (D.C. Cir., 1951)

Sheryl Wilfred carried Johnetta to term and she re-received regular financial aid from John Henry Jones. The uncontradicted testimony reflects that from the time Johnetta was in utero, and continued to the date of his death, John Henry Jones sent Sheryl Wilfred hundreds of dollars for their support, in regular payments. In addition, he bought the child clothing and gifts. Applying the test in *Sheppeard Standard Dredging Corporation v. Henderson,* 150 F.2d 78 (5th Cir., 1945) Johnetta Rene Wilfred is an eligible child entitled to death benefits under the act.

C. The Fifth Circuit Court of Appeals was correct in concluding that a factual determination of whether an illegitimate child is "acknowledged" should be made based on its plain common meaning and relevant federal case law.

Article 203 of the Louisiana Civil Code provides one method of establishing filiation of an illegitimate child:

> The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and

> mother or either of them, or it may be made in the registering of the birth or baptism of the such child.

It was concluded by the Benefit's Review Board and the Fifth Circuit Court of Appeal agreed and respondent concurs that the decedent's deposition testimony was taken by a certified shorthand reporter and notary public before four witnesses is a declaration publicly acknowledging the illegitimate child in the instant case for purposes of Article 203.

D. The Fifth Circuit Court of Appeals was correct in finding that the child's cause of action should not be offset or prejudiced because of a settlement between other parties.

The fact is that Johnetta Rene Wilfred has not received any benefits under this Act. Petitioners argue that decedent settled for his "heirs, executors, administrators, assigns, next of kin, other legal representatives" and therefore the claim on behalf of the minor child, Johnetta, is barred. The fact is that John Henry Jones did not have the power to settle or waive in advance any death benefits that might accrue to his minor daughter. The Act clearly contemplates that the rights of minors and those found mentally incompetent ought to be protected. Section 911 envisions the appointment "by a Court of competent jurisdiction" of a guardian for a minor, one who would then be empowered to act on behalf of the minor. The law of Louisiana, Johnetta's domicile, would control. If not, the law of decedent's domicile, Texas would. Under the laws of either state, "approval is required to compromise and settle a minor's claim". Louisiana Code of Civil Procedure Article 4265 and Rule 44, Texas rules a civil procedure. This was not done in this case. Therefore, the

rights of the minor should be unaffected by the settlement agreement signed by the father.

E. The Fifth Circuit Court of Appeal was correct in that the minor child's cause of action has not been prejudiced due to the scope of a settlement which the child was not a party.

In the alternative, counsel for petitioners, St. John Stevedoring and Insurance Company of North America, knew of the existence of the minor child at the time of the video deposition. They knew, or should have known that this child may have had an interest in this settlement, but yet, did not seek the child or protect the rights of St. John Stevedoring or Insurance Company of North America or the minor child. Why should the minor child's right be denied for this omission?

———o———

CONCLUSION

The evidence clearly proves that the minor child, Johnetta Rene Wilfred, is the illegitimate, acknowledged child of the decesaed, John Henry Jones. The evidence proves that he sent the mother, Sheryl Ann Wilfred, before the birth of the child and after, substantial sums of money and that the mother and the child were dependent on same. The Court must uphold the Board of Review and the Fifth Circuit Court of Appeals and order the payment of death benefits to this little girl as soon as possible.

RESPECTFULLY SUBMITTED:

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Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-273 and 87-381

In the Supreme Court of the United States

OCTOBER TERM, 1987

ST. JOHN STEVEDORING COMPANY, ET AL.,
PETITIONERS

v.

JOHNETTA WILFRED

ALENE C. JONES, PETITIONER

v.

ST. JOHN STEVEDORING COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a surviving dependent parent's death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, may be subject to an offset as the result of a third-party settlement signed by the decedent and the surviving parent.

2. Whether the court of appeals properly concluded that a surviving minor child is entitled to death benefits under the Longshore and Harbor Workers' Compensation Act, as an "acknowledged illegitimate child dependent upon the deceased," where ample uncontroverted evidence indicated both acknowledgement of paternity and dependency.

3. Whether a surviving minor child's claim to receive death benefits under the Longshore and Harbor Workers' Compensation Act may be extinguished or reduced by a settlement of a third-party tort suit that was entered into by the employee on behalf of himself and his "heirs [and] next of kin," but in which the child was not separately represented.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-273

ST. JOHN STEVEDORING COMPANY, ET AL., PETITIONERS

v.

JOHNETTA WILFRED

No. 87-381

ALENE C. JONES, PETITIONER

v.

ST. JOHN STEVEDORING COMPANY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (St. John Pet. App. A1-A7)[1] is reported at 818 F.2d 397. The opinion of the Benefits Review Board (St. John Pet. App. B1-B9) is reported at 18 Ben. Rev. Bd. Serv. (MB) 68. The opinion of the administrative law judge (St. John Pet. App. C1-C10) is reported at 17 Ben. Rev. Bd. Serv. (MB) 109.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1987. Petitions for rehearing were denied on

[1] "St. John Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-273.

July 1, 1987 (St. John Pet. App. A8-A9). The petition for a writ of certiorari in No. 87-273 (St. John Pet.) was filed on August 15, 1987. The petition for a writ of certiorari in No. 87-381 (Jones Pet.) was filed on September 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. John Henry Jones was injured on May 27, 1979, while working for petitioner St. John Stevedoring Co. (St. John) (St. John Pet. App. A1, B2, C3). As a result of that injury, St. John paid compensation benefits to Jones under the Longshore and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. 901 *et seq.*

The issues in this case arise from an agreement entered into on December 23, 1981, settling a tort suit Jones had brought against third parties in connection with his injury (St. John Pet. App. A1-A2).[2] The settlement agreement[3] was executed by Jones, his mother (petitioner Alene Jones), his employer (St. John), the employer's insurer (Insurance Company of North America (INA)) and several tort defendants (*id.* at A2), and provided that the tort defendants would immediately pay to Jones $1.78 million, and further provided for prospective annual payments of $280,000 for the rest of Jones's life, commencing in December 1982 (*ibid.*).[4] The settlement agreement contemplated that if Jones died before December 1986, then the annual payments would continue to be paid through December 1986 to his mother or, in the event of

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[2] By the date of the settlement Jones's LHWCA compensation totaled $291,839.71 (St. John Pet. App. A1).

[3] The settlement agreement is reproduced at pages 24-33 of the appendix to the petition for a writ of certiorari in No. 87-381.

[4] In addition, Jones's mother received an immediate cash payment of $5,000 (Pet. App. A2).

her death, to Jones's estate (*ibid.*). In addition to resolving all claims against the third-party tortfeasors, the settlement provided that St. John and its insurer would be fully reimbursed for the benefits they paid under the LHWCA and would receive " 'a credit * * * for accrual of all compensation benefits and medical expenses in the future' " (*ibid.*). The settlement agreement specified the parties' intent to bind Jones's " 'heirs, executors, administrators, assigns, next of kin, or other legal representatives' " (*id.* at A6).

Jones died in June 1982, before the date upon which the first annual payment prescribed in the agreement was due (St. John Pet. App. A2, B2, C3). Under the terms of the settlement, therefore, Jones's mother received more than $1.4 million ($5,000 plus five annual payments of $280,000 each) (*id.* at A6). Independent of the settlement, Jones's mother filed a separate claim under Section 9 of the LHWCA, 33 U.S.C. 909, for death benefits from the employer, as did Sheryl Wilfred, on behalf of Jones's alleged minor daughter Johnetta Wilfred (Pet. App. A2, C1). Those latter claims are the subject of this action.

2. The administrative law judge (ALJ) awarded LHWCA death benefits to Jones's mother on the ground that she had been economically dependent on Jones (St. John Pet. App. C4), but denied benefits to Jones's putative daughter (*id.* at C10). The ALJ explained that state law is dispositive on the question whether a claimant is decedent's "child" for purposes of statutory eligibility[5] "because the LHWCA does not define this operative term" (*id.* at C5). The ALJ concluded that, under the standards established by the law of Louisiana (the state in which the

[5] Section 2(14) of the LHWCA, 33 U.S.C. 902(14), says that a child entitled to death benefits includes an "acknowledged illegitimate child dependent upon the deceased."

the child was domiciled (*id.* at C5-C6)), "it ha[d] not been definitively established that the decedent was the natural father" (*id.* at C9).

3. The Benefits Review Board (BRB or the Board) reversed the ALJ's denial of benefits to the child (St. John Pet. App. B9).[6] The Board ruled that federal, not state, law controlled whether Jones had acknowledged paternity for purposes of the Act, and that, under federal law, "the evidence overwhelmingly supports a finding of acknowledgement" (*id.* at B4). The Board also concluded that "uncontradicted testimony" established the child's dependency as a matter of law (*id.* at B6) and that she was therefore entitled to receive statutory death benefits.

The Board affirmed the ALJ's award of benefits to Jones's mother. It rejected (St. John Pet. App. B7) the argument that Section 33(g) of the Act, 33 U.S.C. 933(g), requiring third-party settlement agreements to be approved in writing by the employer and timely filed with the Department of Labor, bars statutory compensation here. That provision, it said, is applicable only if the amount of the third-party settlement is less than the compensation awarded under the Act, and in this case the settlement was for considerably more than the amount of statutory death benefits (St. John Pet. App. B7). Further, the Board stated (*ibid.*) that, in any event, the procedural formalities of Section 33(g) did not apply to Jones's mother because, as Jones was still living at the time of the settlement, his mother was not then a "person entitled to compensation" in the form of death benefits within the meaning of Section 33(g)(1), 33 U.S.C. (Supp. III) 933(g)(1).

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[6] The Director, Office of Workers' Compensation Programs, to whom the Secretary of Labor has delegated authority to administer the Act (20 C.F.R. 701.202, 802.410(b)), is an automatic party in LHWCA cases. 20 C.F.R. 801.2(10); *Ingalls Shipbuilding Division* v. *White*, 681 F.2d 275, 279 (5th Cir. 1982); *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 482 (D.C. Cir. 1982).

Relying upon its conclusion that Jones's mother was not a "person entitled to compensation" within the meaning of Section 33(g), the Board also reasoned that St. John was not entitled under Section 33(f), 33 U.S.C. 933(f), to reduce its LHWCA benefits payments to Jones's mother to reflect the third-party settlement (St. John Pet. App. B8). In the Board's view, "the settlement was entered into prior to death and presumably compensated the employee and mother for loss due to the employee's disability, rather than loss due to his death" (*ibid.*).

4. The court of appeals affirmed the Board's award of benefits to Jones's illegitimate child and reversed the Board's denial of St. John's request that money paid pursuant to the settlement be credited against benefits owing to Jones's mother (Pet. App. A7).

The court of appeals reasoned that Johnetta Wilfred was an "acknowledged illegitimate child dependent upon the deceased" (33 U.S.C. 902(14)), and thus was entitled to LHWCA death benefits. The court relied (St. John Pet. App. A4) on *Texas Employers' Insurance Ass'n* v. *Shea*, 410 F.2d 56 (5th Cir. 1969) and *Weyerhaeuser Timber Co.* v. *Marshall*, 102 F.2d 78 (9th Cir. 1939)), to support the proposition that even if state law precludes a designation of paternity, LHWCA benefits may still be awarded if a paternal link is proved. On the facts of this case, the court of appeals concurred in the Board's conclusion that " 'the evidence overwhelmingly supports a finding of acknowledgment' " (St. John Pet. App. A4). The court also agreed with the Board that the child, who was in utero at the time of Jones's injury, was dependent on Jones (*id.* at A4-A5).

With respect to Jones's mother, the court stated that it "do[es] not disagree necessarily with the reasoning of the BRB on th[e] statutory interpretation" that Jones's mother was statutorily barred from death benefits or required by statute to set off settlement monies against them, because

at the time the settlement agreement was formalized she was not a "person entitled to compensation" under either Section 33(g) of Section 33(f) of the LHWCA. But the court also found that by participating in the settlement Jones's mother had "obligated herself to give the employer and compensation carrier credit for all sums she received as a result of the tort settlement agreement" (St. John Pet. App. A6). Since her recovery under the settlement would far exceed any death benefits under the LHWCA, the court therefore decided that St. John and its insurer "are entitled to a credit for the full amount of compensation benefits owed to the decedent's mother" (*ibid.*).

By contrast, the court rejected St. John's argument that a similar set-off should be applied to the minor child's LHWCA benefits. Although the settlement agreement purported to bind Jones's " 'heirs * * * [and] next of kin' " (St. John Pet. App. A6), at the time of the settlement Johnetta Wilfred was not represented by a statutory guardian responsible for protecting her rights (§ 11, 33 U.S.C. 911). The court therefore concluded that Jones lacked authority to settle or waive in advance any right to death benefits that might accrue to his child (St. John Pet. App. A7).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioners in No. 87-273 (St. John and INA) contend (Pet. 7-10) that the court of appeals and the Board improperly substituted their views for those of the ALJ on the question of filiation and impermissibly made findings as to dependency even though the ALJ had not reached that issue. Petitioners, however, misperceive the nature of

the review function exercised by the Board and affirmed by the court of appeals.

Section 9(c) of the LHWCA, 33 U.S.C. 909(c), entitles a surviving "child" to death benefits in the event of an "injury [that] causes death,"[7] and Section 2(14), 33 U.S.C. 902(14), defines "child" as including an "acknowledged illegitimate child dependent upon the deceased." The ALJ held (St. John Pet. App. C5-C6) that state law governs the question whether one is a decedent's "child" within the meaning of the Act "because the LHWCA does not define this operative term."

The Board correctly applied federal rather than state law to this issue and the court of appeals correctly upheld that decision. It has long been settled that in determining whether an illegitimate child is entitled to benefits under the Act, the statutory definition is "complete in itself" and does not require resort to state law. *Weyerhaeuser Timber Co.* v. *Marshall*, 102 F.2d 78, 81 (9th Cir. 1939) ("Congress having provided all definitions necessary to the determination of whether claimant is a 'child' and its authority being paramount and exclusive as to the subjects on which it has legislated, it is not allowable to go beyond the Act provisions.").[8] It is likewise settled under the

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[7] At the time of the employee's death in 1982, the LHWCA also provided death benefits "if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(d), 86 Stat. 1253-1254. That broader death benefits provision was in effect between 1972 and 1984. See, *e.g.*, *Travelers Insurance Co.* v. *Marshall*, 634 F.2d 843 (5th Cir. 1981).

[8] Having found that the ALJ's findings of filiation rested on an erroneous view of the law, the Board correctly set them aside on that basis. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982). See also *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); *United States* v. *Singer Mfg. Co.*, 374

LHWCA that acknowledgment—the statutory standard for paternity[9]—"does not require a notary's seal or any other ritualistic proclamation." *Texas Employers' Insurance Ass'n* v. *Shea*, 410 F.2d 56, 61 (5th Cir. 1969).

U.S. 174, 194 n.9 (1963). Moreover, as the court of appeals noted (St. John Pet. App. A4), the Board "readily concluded that 'the evidence overwhelmingly supports a finding of acknowledgment.' " Remand was unnecessary on the question of filiation because "the record permits only one resolution of the factual issue." *Pullman-Standard*, 456 U.S. at 292 (citing *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974)). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985).

For the same reason, there was no need for the Board to remand to the ALJ on the question of dependency. Johnetta Wilfred was conceived five days before her father was injured, and "[d]uring the time Sheryl Wilfred carried Johnetta to term, she received regular financial aid from John Henry Jones" (St. John Pet. App. A5). The court of appeals, concurring in the Board's finding of dependency, emphasized (*ibid.* (emphasis in original)):

> The uncontroverted testimony reflects that from the time Johnetta was *in utero*, and continuing to the date of his death, John Henry Jones sent Ms. Wilfred hundreds of dollars for their support, notably in regular payments. In addition, he bought the child clothing and gifts.

As the court held (*ibid.*), these facts fully established dependency under the LHWCA. See *Texas Employers' Insurance Ass'n* v. *Shea, supra; United States* v. *Fidelity & Guaranty Co.* v. *Britton*, 188 F.2d 674 (D.C. Cir. 1951); *Standard Dredging Corp.* v. *Henderson*, 150 F.2d 78 (5th Cir. 1945); *Texas Employers' Insurance Ass'n* v. *Sheppeard*, 62 F.2d 122 (5th Cir. 1932).

[9] Petitioners suggest (St. John Pet. 7-8), based on *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), that the acknowledgment requirement is unconstitutional. Even if this argument were meritorious, it would not help their case; eliminating acknowledgment as a factor would not strengthen the employer's case because it would become easier for a child to establish entitlement to benefits. In any event, *Weber* held that a state worker's compensation statute violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against an unacknowledged illegitimate who was otherwise dependent on the injured worker. "[D]ependency, not the legality

2. Petitioner in No. 87-381, Jones's mother, contends (Pet. 9) that the court of appeals incorrectly required her to set off against her statutory death benefits the amount received from the third-party tortfeasors—thus entirely cancelling out her claim to statutory benefits.[10] She contends that since she was not entitled to any benefits under the LHWCA at the time the third-party settlement was executed, the settlement could not have extinguished her statutory right to death benefits (*id.* at 10). In the alternative, petitioner contends that her participation in the settlement was not fatal to her right to receive death benefits under the LHWCA as a matter of contract interpretation (*id.* at 11-14).

The Board held, and the court of appeals did "not disagree necessarily" that Mrs. Jones's entitlement to benefits was not barred by her failure to comply with the procedural requirements of Section 33(g), nor were her benefits subject to an offset under Section 33(f). Section 33(g) provides that in order for a "person entitled to compensation" to compromise a claim against a third-party for less than the total compensation payable under the statute, that person must first secure the employer's permission to settle. That Section is not applicable here because the settlement amount *exceeded* the death benefits (see note 10, *supra*). Section 33(f),[11] which generally provides for off-

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of the father's nuptials, [has always been] the keynote of coverage" under the LHWCA (*Texas Employers' Insurance Ass'n* v. Shea, 410 F.2d 56, 59 (5th Cir. 1969)).

[10] As previously noted (page 3, *supra*), petitioner received $5,000 in her own right during Jones's lifetime, and $1.4 million after his death under the contingency provided for in the settlement. By contrast, petitioner's statutory death benefits could not amount to more than a few thousand dollars a year. See St. John Pet. App. B7 & n.5.

[11] Section 33(f), 33 U.S.C. (Supp.III) 933(f), provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the

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set of third-party tort recoveries against compensation benefits, likewise does not apply because, as the Board stated, Mrs. Jones was not a "person entitled to compensation" within the meaning of that section at the time she entered into the settlement (St. John Pet. App. B7-B8). The court of appeals, without questioning any of this reasoning, "perceiv[ed] a contractual basis for requiring a credit," arising from an explicit term of the settlement agreement which Jones's mother signed (*id.* at A6).

The issue does not warrant further review. The decision of the court of appeals rests on the particular language of the settlement agreement in this case, a factbound determination lacking in general application or significance other than to the parties. In any event, the court of appeals reached the correct result.[12]

> employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

The Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, §§ 21(c) and (d), 98 Stat. 1652, amended Section 33(f) and (g) in ways that are not material to the disposition of the petitions in this case.

[12] Like the court of appeals, we do not quarrel with the Board's conclusion that because Jones's mother was not then entitled to LHWCA benefits Section 33(f) was inapplicable when the settlement was executed. A basic principle of workers' compensation law is that a dependent's right to death benefits is independent from the employee's compensation claim and does not arise until the employee's death. 2 A. Larson, *The Law of Workmen's Compensation* § 64.11 (1987); *Puig* v. *Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979) ("the cases under the Longshoremen's Act have consistently held that the right to death benefits is separate and distinct from the right to disability benefits and does not arise until death occurs"); *International Mercantile Marine Co.* v. *Lowe*, 93 F.2d 663, 665 (2d Cir.) ("[w]hen death occurs, a new cause of action arises which requires an

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3. Petitioners in No. 87-273, St. John and INA, further contend (Pet. 5-7) that the third-party settlement entitled them to an offset against the future death benefits not only of Jones's mother—a signatory to the agreement—but against the future death benefits of the minor daughter as well. In support of this contention, petitioners recite (*id.* at 6) that Jones settled his third-party claim, not only for himself, but also for his " 'next of kin' " and thereby cut off the child's claims against the third-party tortfeasors.

The court of appeals stated that Jones "did not have the power to settle or waive in advance any death benefits that might accrue to his minor daughter" (Pet. App. A7). As the court noted (*ibid.*), the LHWCA favors the protection of the rights of minors, specifically through the appointment, as appropriate, of a guardian "by a court of competent jurisdiction." 33 U.S.C. 911. In the present case, there was no court-appointed legal guardian to represent the

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adjudication on all questions such as accident, notice of death, claim, causal relationship, and dependency"), cert. denied, 304 U.S. 565 (1938).

The Board's view would not preclude the possibility that Section 33(f) became applicable when Mrs. Jones became "entitled to compensation," viz., at the moment of her son's death. Under this reading, any amount that she recovered under the settlement agreement before her son's death would not be subject to the statutory offset. The amount she received after his death, however, could be offset against future death benefits if the settlement agreement contemplated that result. Since such an offset, limited to payments received after the settling parent became entitled to benefits, is permitted by the language and purpose of Section 33(f), it is not inconsistent with the policy against release of statutory entitlements expressed in Section 16 of the LHWCA, 33 U.S.C. 916. See *Great Lakes Dredge & Dock Co.* v. *Brown*, 47 F.2d 265 (N.D. Ill. 1930). Moreover, recognition of an offset under Section 33(f) fully effectuates the statutory policy against double recovery. *Aetna Life Ins. Co.* v. *Moses*, 287 U.S. 530, 542 (1933). See also *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 79, 87 (1980); *Carter* v. *Director, OWCP*, 751 F.2d 1398, 1400-1402 (D.C. Cir. 1985).

interests of the child in the settlement. Unlike Jones's mother, therefore, his daughter did not participate in execution of the settlement, and she received nothing under the settlement either before or after her father's death. On the other hand, petitioners St. John and INA had intervened in the third-party suit and were parties to the settlement. See Jones Pet. App. 24, 32-36. Petitioners' interests were fully represented and they have no cause to complain that the settlement indirectly prejudiced their rights as against the unrepresented minor.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1987

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60113